STATE OF MICHIGAN

COURT OF APPEALS

BARBARA BUFFORD THACKER,

Plaintiff-Appellant,

v

ENCOMPASS INSURANCE, SOIL & MATERIALS ENGINEERS, INC., and COLBY COMPANY, INC., a/k/a SERVPRO OF BLOOMFIELD & LIVONIA,

Defendants-Appellees.

UNPUBLISHED
May 25, 2006

No. 265405
Livingston Circuit Court
LC No. 03-020282-NO

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of this case arising out of mold remediation efforts. We affirm.

On October 31, 2003, plaintiff filed her complaint against defendant Encompass Insurance alleging that on or after July 1, 2001, she repeatedly requested assistance from defendant, her insurance provider, regarding water-related problems and was denied assistance. In count one of her complaint, plaintiff alleged negligence, breach of contract and breach of warranty claims based on defendant's failure to reconstruct, repair, and maintain her premises in a good and workmanlike manner so as to be fit for its intended and foreseeable use. In count two of her complaint, plaintiff alleged a nuisance claim, averring that the premises contained toxic levels of mold, was in a state of disrepair, and contained leaks that contributed to the proliferation of toxic mold. In count three of her complaint, plaintiff alleged a claim of "outrageous conduct" premised on defendant's false claims that the home was adequately repaired and safe even though there was water damage and toxic mold throughout the home. On August 17, 2004, plaintiff amended her complaint to add defendants Soil & Materials Engineers, Inc. (SME) and Colby Co., Inc., the companies "whose work failed to remedy and/or worsened the dangerous conditions."

On September 9, 2004, SME moved for summary disposition under MCR 2.116(C)(8), arguing that plaintiff's complaint failed to state a cause of action because it merely set forth conclusions, unsupported by allegations of facts or the proper statements of law. The motion was granted, without prejudice and plaintiff was permitted to file a second amended complaint. In count one of the second amended complaint, plaintiff alleged negligence based primarily on

the failure to reconstruct, repair, and remediate the premises which resulted in chronic water damage and mold contamination that caused plaintiff to experience toxic mold poisoning and loss of property. In count two of the complaint, plaintiff alleged breach of contract "with and for the benefit of Plaintiff, to perform all necessary testing, remediation, and repair work with reasonable care and in good and workmanlike manner."

On November 29, 2004, SME moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that plaintiff's second amended complaint should be dismissed because (1) with regard to the negligence claim, "there are no facts to support any of the requisite elements for such a claim," and (2) with regard to the breach of contract claim, there was neither a contract between SME and plaintiff nor was plaintiff the beneficiary of a contract SME had with a third-party. Plaintiff responded to the motion, arguing that SME was contracted by her insurance company, for plaintiff's benefit, to provide services related to damage to plaintiff's home from water and mold. SME also was required by law, as one undertaking to render services, not to perform those services in a negligent manner. Therefore, plaintiff argued, she had lawful claims against SME under negligence and breach of contract theories.

Following oral arguments, on January 13, 2005, the court issued its opinion granting SME's motion on the merits. Relying on *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004), the trial court held that SME was hired by Service Master, who was hired by the insurer, and SME did not owe a duty to plaintiff that was separate and distinct from its contractual obligations; therefore, plaintiff's negligence claim failed. The trial court also held that "[t]he express conditions of the contract limit SME's liability to exclude the Plaintiff," therefore, plaintiff was not a third-party beneficiary and could not succeed on a breach of contract claim. An order dismissing all claims against SME was entered accordingly.

On February 22, 2005, Encompass Insurance moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Encompass Insurance argued that plaintiff was not the owner of the property at issue; instead, she was a tenant in her parents' house and, although her parents had a homeowners insurance policy on the house, plaintiff was not an insured under that policy. Therefore, Encompass Insurance argued, plaintiff's negligence claim failed as a matter of law because she did not have standing to maintain a first-party action. And, because there was "no privity of contract between Encompass Insurance and Plaintiff to test, remediate or repair" her parents' dwelling, plaintiff's breach of contract claim must also be dismissed.

On March 28, 2005, defendant Colby moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Colby argued that it was hired by Encompass Insurance to attempt a second remediation of the alleged mold that resulted from a water intrusion incident. On October 8, 2002, plaintiff signed Colby's agreement to perform the work and then she signed a Certificate of Satisfaction on November 6, 2002, after the work was completed. The contract that plaintiff executed included the following provisions: (1) "no action, regardless of form, relating to the subject matter of this contract may be brought more than one (1) year after the claiming party knew or should have known of the cause of action," and (2) "customer acknowledges and agrees that mold is commonly found throughout the environment and that it is impossible to eradicate mold," thus, Colby "does not guarantee the removal or eradication of mold." The contract also expressly disclaimed any warranties and provided a waiver of liability. Therefore, Colby argued, plaintiff's claim must fail because it was untimely and, in any event, plaintiff agreed that there was no guarantee and waived her right to sue Colby.

On April 12, 2005, plaintiff responded to both defendants' motions for summary disposition. Plaintiff argued that "both MCL 600.1405 et seq., [third-party beneficiary] and the common law supported her claims that Defendants breached their contracts concerning said premises by failing to perform all necessary testing, inspection, and repair work with reasonable care and in a good workmanlike manner." Plaintiff claimed that (1) she was a named insured as a "covered person" under her parents' insurance policy because she was the daughter of the policy holder, and (2) she was a third-party beneficiary to a second home insurance contract. With regard to Colby, plaintiff argued that she did not sign the purported waiver of liability and, because Colby undertook to provide the mold remediation services, under Restatement Torts, 2d, § 324A, it had a duty to exercise reasonable care and breached that duty. Plaintiff filed a supplemental response reiterating her arguments that she was insured under her parents' insurance policy and she was a third-party beneficiary of the contracts between her insurer and the companies it hired to provide services in her home.

Encompass Insurance replied to plaintiff's response to its motion for summary disposition, arguing that plaintiff rented the house at issue and did not have a homeowners insurance contract for the dwelling. Plaintiff's parents were the owners of the house and they had a policy in their names only. Plaintiff had a renter's insurance policy that covered her personal property in the event of loss. Encompass Insurance argued that it did not owe a duty to plaintiff separate and distinct from the contract alleged by plaintiff, thus, it could not be liable in tort and summary dismissal was proper under MCR 2.116(C)(8). See *Fultz, supra*. Encompass Insurance also argued that summary disposition was proper under MCR 2.116(C)(10) because the named insureds—her parents—admitted that they were completely satisfied with the repairs to their house and plaintiff admitted that she was not a resident of her parents' household, a prerequisite to recovery under the terms of the policy.

On April 26, 2005, the trial court read its opinion into the record. The court concluded that Colby was entitled to summary disposition pursuant to the terms of its service contract, that plaintiff executed, which stated that there was no guarantee that the mold could be eradicated and plaintiff waived any and all claims arising from the provision of its services. The court also concluded that Encompass Insurance was entitled to summary disposition because (1) plaintiff was not a covered family member under her parents' homeowners insurance policy since she was not living in the same household as her parents on the date of loss, and (2) even if plaintiff was a third-party beneficiary of the contract, she could not sue on it because the parties to the contract agreed that the performance was complete and satisfactory. Thereafter, an order dismissing the case in its entirety was entered. Plaintiff's motion for reconsideration was denied and this appeal followed.

First, plaintiff argues that Encompass Insurance was not entitled to summary disposition because she was an insured under two policies of insurance that it issued—her parents' homeowners insurance policy and her own insurance policy. After de novo review to determine whether plaintiff established a genuine issue of material fact as to her entitlement to the claimed coverage, we disagree. See MCR 2.116(C)(10); *Spiek v Michigan Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

An insurance policy is a contract between the parties. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). Thus, insurance policies are construed in accordance with the principles of contract construction. *Farmers Ins Exch v Kurzmann*, 257

Mich App 412, 417; 668 NW2d 199 (2003). Accordingly, the primary goal of its interpretation is to honor the intent of the parties, which is discerned by considering the language of the contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 476; 663 NW2d 447 (2003). The insurance contract is read as a whole and meaning is given to all of its terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003). Unless defined in the policy, the terms are given their common and plain meaning, but a court may establish the meaning of a term through a dictionary definition. *Twichel v MIC General Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004); *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000).

Here, plaintiff argues that she is a "covered person" within the contemplation of the homeowners insurance policy issued by Encompass Insurance to her parents. Under the definition section of the policy, "covered person" "means you and the following residents of your household: a. Your family members . . . ." And, the family member "must have been actually residing in your household the date the loss occurred." But, plaintiff does not dispute that her parents did not live in the same house with her where and when the losses allegedly occurred. Therefore, as the trial court concluded, we also conclude—she was not a covered person within the contemplation of the contract because she was not a resident of her parents' household. As this Court held years ago, the ordinary and plain meaning of the word "household" includes, at least, those persons living under the same roof. See *Thomas v Vigilant Ins Co*, 156 Mich App 280, 282-283; 401 NW2d 351 (1986). Plaintiff did not live under the same roof as her parents at the time of the alleged loss thus she is not a "covered person" under their homeowners insurance policy. See *id*. at 283-284.

Plaintiff also argues that she is "a third-party beneficiary to the second home insurance contract." The brevity of plaintiff's argument makes it difficult to discern to what policy of insurance she is referring. Plaintiff never clearly articulated the exact nature of this purported policy. However, the only other policy that appears to apply is a renter's insurance policy issued directly to plaintiff that covered losses to her tangible personal property and any building additions and alterations. Consequently, plaintiff's argument with respect to insurance coverage as a "third-party beneficiary" is without merit. If, however, plaintiff is arguing that she is a third-party beneficiary of her parents' homeowners insurance contract, as discussed below, we disagree.

Next, plaintiff argues that defendants were not entitled to summary disposition because she was a third-party beneficiary of the contracts that were entered into by defendants for the provision of services related to the toxic mold problem in the house she lived in that eventually caused her illness. We disagree.

Generally, a person who is not a party to a contract cannot enforce its terms unless she proves that she was an intended third-party beneficiary of the contract. See *Oja v Kin*, 229 Mich App 184, 192-193; 581 NW2d 739 (1998); *Alcona Community Schools v Michigan*, 216 Mich App 202, 204; 549 NW2d 356 (1996). Third-party beneficiary law in Michigan is codified at MCL 600.1405 and provides, generally, that a contractual promise will be construed as having been made for the benefit of a person or designated class of persons when the promisor undertook to give, do, or refrain from doing something directly to or for the person or class of persons. See MCL 600.1405; *Koenig v South Haven*, 460 Mich 667, 676; 597 NW2d 99 (1999); *Krass v Tri-County Sec, Inc*, 233 Mich App 661, 665-666; 593 NW2d 578 (1999). Whether the

parties intended to confer a benefit on another is determined by examining the contract using an objective standard. *Id.*

In this case, other than copies of Encompass Insurance's policies, plaintiff has failed to provide copies of the relevant contracts, or any other documentary evidence regarding the pertinent terms or provisions of the contracts, she claims she is entitled to enforce. Such evidence is required to determine whether the promisors undertook to give or to do or refrain from doing something directly to or for her. See *Koenig*, *supra* at 680. That plaintiff incidentally benefited from the contracts is insufficient to establish that she was an *intended* third-party beneficiary of the contractual promises. See *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003). Therefore, plaintiff has failed to establish a genuine issue of material fact with regard to her claims against SME and Colby premised on this theory. See MCR 2.116(C)(10). To the extent that plaintiff argues that she was a third-party beneficiary of her parents' homeowners insurance policy, we disagree. Plaintiff has failed to reference the policy provision that she relies on to support her third-party beneficiary claim and we can find no such provision. Therefore, she has also failed to establish this claim against Encompass Insurance on this theory. See *Schmalfeldt*, *supra* at 429.

Finally, plaintiff argues that genuine issues of material fact exist regarding whether SME and Colby breached their common-law duties, as described in Restatement Torts, 2d, § 324A, to perform their contractual undertakings with ordinary care. We disagree. Plaintiff's claims against SME were dismissed by the trial court on the ground that, contrary to the *Fultz* holding, plaintiff failed to establish that SME owed a duty to her that was separate and distinct from its contractual obligations. On appeal, plaintiff has failed to distinguish the *Fultz* holding or establish SME's independent duty. Accordingly, we conclude that her claims against SME were properly dismissed. As to her claims against Colby, the trial court dismissed them on the ground that plaintiff agreed to the terms of its service contract—in particular that there was no guarantee that the mold could be eradicated and that she waived all claims arising from the provision of its services. On appeal, plaintiff has failed to challenge this holding and thus we affirm the dismissal on this ground. To the extent that plaintiff is arguing that Colby breached its common-law duties as well, we conclude that she has failed to establish that an independent duty existed, as required by *Fultz*, and the claim is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto